No. 11,715

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR A. SADLER,
Appellant,

vs.

CLARENCE T. SADLER,
Appellee.

APPELLANT'S REPLY BRIEF.

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Subject Index

Table of Authorities Cited

Statutes

Texts

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RE APPELLEE'S STATEMENT OF THE CASE.

Appellee states (Ans. Br. p. 3; see also Id. pp. 6, 22) that the ownership of the Diamond Valley Ranch was a "matter of dispute" between the heirs of Reinhold Sadler and the Hermann J. Sadler branch of the family acting through the Huntington and Diamond Valley Stock and Land Company. We say there was no dispute as to any of the parties claiming as heirs of Reinhold Sadler, deceased; that the counterclaims of Edgar, Alfred, Clarence, Bertha and Louisa Sadler in the 1918 suit had to do with a claim of adverse possession and claims for money judgments for advances and for services only (R. 543, 555) in connection with said Diamond Valley Ranch. No claim whatsoever as heirs of Reinhold Sadler were

ever asserted in said action against the land or property involved here. The reference to "(Para. 5 of Ex. 1)" in appellee's answer brief, p. 4, is in error, as there is no Paragraph 5 of such exhibit in the record.

In our opening brief (pp. 6-10) we made the point that Edgar Plummer, grandson of Reinhold Sadler, was an indispensable party having an undivided 25% interest, but the trial Court ruled without his being before the Court that his interest was only 13%.

The Statute, N.C.L., Sec. 9922 (Op. Br. p. 9) mandatorily provides for the precise situation of this grandson, i.e., that he takes the same interest his deceased mother would have taken had she survived the testator Reinhold Sadler. The trial Court found plaintiff-appellee was the owner of an undivided 29%. Admittedly the other heirs, viz.: Edgar and the heirs of Alfred, would each be entitled to exactly the same interest as appellee. Hence the decree awards a total of 87% of the entire estate, leaving only 13% to Edgar Plummer.

This Court has ruled that the test in determining what is an indespensable party is, *inter alia:*

> "Will the decree if made, in the absence of such party, have no injurious effect on the interests of such absent party?
>
> *State of Washington v. United States* (C.C.A. 9th), 87 F. (2d) 421, 428.

See also: Opening Brief, p. 10.

Edgar Plummer, as grandson of testator, was the issue of testator's daughter Wilhelmina, who died in 1903, predeceasing testator who died in 1906. Testator omitted to provide in his will for said grandson. The Nevada statute provides:

> "When any testator shall omit to provide in his or her will for any of his or her children, or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate".
>
> N.C.L., Sec. 9919.

The only Nevada decision construing the above statute is the case infra, where a daughter by adoption claimed the benefit of the statute in the estate of her deceased father who left a will omitting to make provision for said daughter. The trial Court decided against the claim of the daughter, but this was reversed on appeal,—the Court in its opinion saying:

> "The statute which she has invoked by showing that she is the natural and adopted child of the deceased raises the presumption that her omission from the will was unintentional. Before this presumption can be overthrown and the contrary intention established in point of law, it must appear from the face of the will that the intention to omit appellant is expressed therein or implied in language so strong as to render any other conclusion unreasonable. If the import of the language of the will is not plain enough to warrant such conclusion, the presumption raised by the

law must prevail on this appeal, and the judgment of dismissal be reversed."

In re Parrott's Estate, 45 Nev. 318, 203 P. 258-261.

Mere devise of whole estate by testator to his wife, without mentioning his children, held not an intentional omission of children.

Re Garraud's Est., 35 Cal. 336, 337.

Language in will relied upon to show intentional exclusion of child or grandchild, must show such intent directly or by implication equally as strong.

In re Stevens' Est. (Cal.), 23 P. 623, 625.

The Circuit Court, by Judge Hawley, held that the reference in the case infra to "my heirs at law" in the will showed an intentional exclusion of the children. The case was appealed, this Court in its opinion saying, *inter alia:*

> "The fact that the children are not named or alluded to in such a manner as to affirmatively show that they were in the testator's mind will furnish conclusive evidence that they were forgotten, and that the testator unintentionally left them unprovided for. * * * The statute creates a presumption that the children were forgotten unless they are named or provided for in the will. * * * The terms of the will, in order to show the intent of the testator to remember his children, or to make provision for them, should, under the statute, be clear, specific, definite and certain. The presumptions of the law are all in favor of the children. These presumptions, in order to disinherit them, or to cut them off with

a shilling or other nominal sum, can only be overcome by the use of words plainly indicating that the testator had his children in his mind at the time he made his will. This must appear either by express mention, or by necessary implication on the face of the will itself."

The judgment of the Circuit Court was reversed.

Boman v. Boman (C.C.A. 9th), 49 F. 329, 330, 332.

See also:

In re Prickett's Est. (Cal.), 239 P. 406, 408-409;

In re Salmon (Cal.), 40 P. 1030, 40 A.S.R. 164;

In re Est. Ross (Cal.), 83 P. 976;

In re Hassell's Est. (Cal.), 142 P. 838;

Spaniard v. Tantom (Okla.), 267 P. 623, 625;

Yeates v. Yeates (Ark.), 16 S.W. (2d) 996, 65 A.L.R. 466;

28 *R.C.L.* 82, Sec. 30 and N. 20;

16 *Am. Jur.,* 853, Sec. 82, 83;

Crocker v. Mullegan, 139 N.Y.S. 381;

Bush v. Lindsey, 44 Cal. 121, 126;

In re Round's Est. (Cal.), 181 P. 638, 639.

Where testator fails to provide for child or issue, of child, there is a presumption said child was unintentionally overlooked. 18 *C. J.,* 841, Sec. 71 and N. 24.

The will here was made September 28, 1881. Testator's daughter (and mother of Edgar Plummer) Wilhelmina died September 9, 1903 (R. 3), and

testator died January 29, 1906. Edgar Plummer was born sometime intermediate the making of the will in 1881 and September 9, 1903 when his mother died. Testator could not have had this grandson in mind when the will was made because the grandson was not then born. The clause (R. 9) in the will that "in case of death of either of the children, then I leave the portion to which it would be entitled to remaining ones and my wife share and share alike" cannot be accepted as evidence of an intentional exclusion of issue of such children. The term "remaining ones" we believe to be synonymous with survivors (60 C. J., 1188; also 54 C. J., 104), and devises to a child "or to the survivor" has been uniformly held not to show intentional exclusion of a grandchild. See

Todd's Est. (Cal.), 109 P. (2d) 913, 918.

To same effect:

Strong v. Smith (Mich.), 48 N.W. 183.

Presumption that testator intended property to go according to laws of descent will be applied in construing ambiguous wills.

Bois v. Bois (Ill.), 159 N.E. 217.

See also:

In re Craig's Est. (Cal.), 148 P. (2d) 100, 104;

Gage v. Gage, 29 N.H. 533 (cited in *Boman v. Boman* (C.C.A. 9th), 49 F. 329, 332).

Burden is upon party claiming statute does not apply.

Rudolph v. Rudolph (Ill.), 69 N.E. 834, 99 A.S.R. 211, 215.

The Illinois statute was very similar to the Nevada statute on the point as to what exclusionary language is necessary to show an intentional omission by testator of the child or the issue of the child. The case infra is a leading case and is in point to the effect that a testator by making a devise to his children and in case of the death of any of them, to the survivors, did not thereby exclude a grandchild from taking the benefit of the statute, i.e., the same share as such grandchild would have taken if the testator had died intestate. We excerpt:

> "There is nothing in the circumstances shown by the will to indicate that at the time it was executed the testator intended that the statute should not apply. There is nothing beyond the bare use of the technical words of survivorship to indicate that he had in mind the disinheritance of one of his grandchildren who had lost his parent before the death of the testator. It cannot be said that he intended to cut off Christian's children because Christian had no children when the will was made. Such an intention could be discovered only from a finding that he intended to cut off any grandchildren whose parent or parents predeceased him. Such would be a most unnatural intention."
>
> *Schneller v. Schneller* (Ill.), 190 N.E. 121, 92 A.L.R. 838-842.

APPELLEE'S ACTION CONSTITUTES AN ATTEMPT TO IMPEACH AND NULLIFY THE DECREE OF MARCH 2, 1918.

In our opening brief (pp. 36-43), we discussed point and cited authorities. Appellee claims (Ans. Br. p. 29) that the March 2, 1918 decree was entered by consent and therefore is not a bar to this suit (in which he is asserting claims and interests which said decree adjudged did not exist). In the record and we believe also in his brief, reference is repeatedly made to the March 2, 1918 decree being for a "family settlement" and by consent, etc., as though that justified appellee's attack.

> "A decree in equity, by consent of parties and upon a compromise between them, is a bar to a subsequent suit upon a claim therein set forth as among the matters compromised and settled". (Syll.)
>
> *Nashville etc. R. R. Co. v. U. S.,* 113 U.S. 261, 28 L. ed. 971.

In the case supra the Court in its opinion (28 L. ed. at page 973) said:

> "* * * a decree, which appears by the record to have been rendered by consent, is always affirmed without considering the merits of the cause. A fortiori, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree".
>
> "But it is said that the decree was merely a consent decree based upon a family settlement. * * * The same general rules which govern judgments generally apply to a judgment by consent as upon stipulation. It is an estoppel, merger or bar

under the same circumstances and to the same extent as any other judgment * * *"

Bullard v. Comrs. (C.C.A. 7th), 90 F. (2d) 144, 147.

See also:

Rogers v. Springfield F. & M. Co. (Cal.), 268 P. 679, 681.

"For a consent decree, within the purview of the pleadings and the scope of the issues, is valid and binding upon all parties consenting, open neither to direct nor collateral attack. 'A fortiori, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree'."

Curry v. Curry (U.S.C.A. D.C.), 79 F. (2d) 172, 174.

See also:

30 *C.J.S.* 1129, Sec. 680.

"A consent decree, which is accepted by the parties themselves as a determination of the controversy and sanctioned by the court, has at least the same force and effect as judgments rendered judicially upon contest or trial." (Citing cases.)

Pick Mfg. Co. v. Gen. Motors Corp. (C.C.A. 7th), 80 F. (2d) 639, 641.

See also:

34 *C. J.* 133, Sec. 337;

15 *R. C. L.* 869, Sec. 345;

Warner v. Tennessee etc. Corp. (C.C.A. 6th), 57 F. (2d) 642, 643;

Woods etc. Co. v. Yankton County (C.C.A. 8th), 54 F. (2d) 304, 308;

Utah Power & L. Co. v. U. S. (Crt. Claims), 42 F. (2d) 304, 308;
Cobb v. Killingsworth (Okla.), 187 P. 477, 479.

Consent judgment entered on settlement of account of administrator, is not open to attack on settlement of trust estate created thereunder.

Bigley v. Watson (Tenn.), 39 S.W. 526, 38 L.R.A. 679, 680.

APPELLEE'S ACTION WAS BARRED BY LIMITATIONS AS WELL AS BY THE EQUITABLE DOCTRINE OF LACHES.

In our opening brief, pages 56 et seq. we argued for application of bar because of plaintiff's laches. At page 5, Op. Br. (also see R. 109), we referred to appellant's defense of the Nevada statute of limitations, N.C.L., Secs. 8524 and 8527,—the first named statute fixing period at three years, and the second named statute fixing a four-year period "after the cause of action shall have accrued".

In the instant case we say appellee's cause of action, if any he had, accrued in September, 1937, when he was informed by his attorney-in-fact (Ex. K—R. 565) that appellant had sold some 800 head of the alleged "trust" cattle and received $60.00 per head,—making a round total of $48,000.00, and which, if we are to believe appellee, appellant converted and retained to his own personal use, as the record is bare of the slightest evidence that he ever accounted for or paid any part of that money to the alleged beneficiaries or any of them. This is confirmed by Ex. N

(R. 573), a letter written by appellee to Alfred, his attorney-in-fact, wherein he charges appellant was using "trust" funds in the purchase of cattle "exclusively for his benefit". If true, under Nevada statute, N.C.L., Sec. 10340, appellant would have been guilty of felony embezzlement punishable by imprisonment in the state penitentiary. Hence it is not too much to charge that with knowledge of such action, keeping appellee's claims in mind, that appellee's alleged cause of action immediately accrued. But he deferred action for some twelve years or eight years beyond the statute of limitations period.

For the reasons above stated and as set forth more fully in appellant's opening brief, we feel the judgment of the trial Court is wrong and should be reversed.

Dated, Reno, Nevada,
January 20, 1948.

Respectfully submitted,
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